United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Penn Development Company, a Corporation,
Appellant,
vs.
C. E. Stoner, et al.,
Appellees.

BRIEF FOR APPELLEES.

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Objections to Consideration of Evidence.

At the beginning we call attention of the court to our objection to the settlement of the bill of exceptions, and move for a dismissal of the appeal for the reasons stated on page 98 of the transcript, to-wit:

"Plaintiffs and respondents object to a settlement of a statement of the evidence on appeal on account of delay and lack of jurisdiction now to settle the same. The appeal was taken on the last day of time in which it could be taken, to-wit, January 31, 1917, and more

than eight months had elapsed since that time without a settlement of the statement of the evidence. No notice of any enlargement of time has ever been given to plaintiffs and respondents, and a term of the Circuit Court of Appeals has been held since the appeal was taken."

No bond staying execution was given, a commissioner has sold the property under the decree, and other rights have intervened. The order made by the district judge did not overrule this objection. [Tr. p. 99.]

STATEMENT OF THE CASE.

We do not fully agree with appellant's statement of the facts.

This is not an unusual case, and the principles upon which the decree was entered are primary and well settled. Briefly stated, the Ventura-California Oil Company, a corporation, whose successors in interest respondents or appellees are as trustees, owned several parcels of oil land in Ventura county, California, on which was a producing well and certain personal property used in connection therewith. A speculator named Dorsey, designing to organize a large corporation, obtained among other properties a contract of purchase upon this property. The agreement [Exhibit A, Tr. p. 11 *et seq.*] provided that Dorsey should purchase the property for $175,000, to be paid in 11,000 shares of Pacific Petroleum Company valued at $110,000, $25,000 par value first mortgage bonds of Pacific Petroleum Company, $15,000 in cash, and by assuming and paying an indebtedness secured by trust deed against

said property to the Citizens Trust & Savings Bank in the sum of $25,000 and interest. By this agreement Dorsey became the principal so far as the incumbrance to the Citizens Trust & Savings Bank was concerned. By a written assignment [Exhibit B, Tr. p. 15 *et seq.*] Dorsey assigned this agreement to the Pacific Petroleum Company, and in the assignment accepted by it, as shown by the evidence, Pacific Petroleum Company assumed and agreed to pay the amounts due or to become due under the agreement, including the indebtedness to the Citizens Trust & Savings Bank. It then became the principal and Dorsey and the Ventura-California Oil Company the sureties, so far as their relations were concerned, in the order named, according to the laws of California.

Dorsey as the organizer of the Pacific Petroleum Company began proceedings for a bond issue, and in order to place the bond issue went east to negotiate with certain financiers in Philadelphia. Meanwhile he issued certain receipts which he called "interim bonds," but which were not bonds and had no value whatever other than a receipt stating that the same would be followed by the bonds when issued. No legal proceedings were ever taken to issue the bonds, and Dorsey was unsuccessful in floating them and they never were issued, but the financiers suggested that a new company be formed to be known as the Penn Development Company, which would advance enough money to take care of the various contracts and debts of the properties which Pacific Petroleum Company had agreed to purchase from various persons, including the Ventura

Company. It was evidently the design, as the evidence showed, on the part of Dorsey and the Pacific Petroleum Company to let the interest go unpaid on the Citizens Savings Bank trust deed and thus to cause a foreclosure and a sale direct to the Penn Development Company or to Mr. Cochran as trustee for it, in order that it might escape the complications mentioned by Mr. Cochran at page 82 of the transcript, which complications included the issuance of the bonds and of the stock of the Pacific Petroleum Company as part payment of the purchase price mentioned in the contract made with Dorsey, and also other complication of indebtednesses on some other properties which do not need to be mentioned here. When Cochran arrived in Los Angeles neither he nor Dorsey informed any officers of the company of all of the terms of the secret agreement made, but assured Mr. Odell, president of the company, and Mr. Peters, secretary, that the proposed Penn Development Company had arranged and agreed with Pacific Petroleum Company to take care of and assume and pay the debt to the Citizens Savings Bank, and to fulfill the terms of Dorsey's contract with the Ventura-California Oil Company. Relying upon the statements of Mr. Dorsey and Mr. Cochran that Ventura-California Oil Company's contract would be taken care of and had been taken care of in their agreements, the officers of the Ventura-California Oil Company ceased efforts to obtain a loan to pay off the indebtedness of the Citizens Trust & Savings Bank, and consented that the sale might go forward, but within a few days after the sale they discovered the terms of the

secret agreement between Pacific Petroleum Company and Penn Development Company and found that their contract rights were placed in jeopardy thereby. After demand made this suit was brought.

The cause was tried before the Hon. Judge Trippet and in deciding the case in favor of the plaintiffs he gave an oral decision, which we quote as follows, not in his exact words but substantially as taken down in notes made at the time:

"In this case the plaintiff owning certain lands in Ventura county, executed a trust deed to the Citizens Trust & Savings Bank to secure an indebtedness of $25,000. This trust deed authorized the trustee to sell the property on default and pay the debt. Thereafter the plaintiff made a contract with Stephen W. Dorsey by which Dorsey agreed to pay certain sums of money and pay the indebtedness for which the trust deed was given. Thereafter Dorsey assigned said agreement to Pacific Petroleum Company, which assumed this obligation and agreed to pay the money Dorsey had promised to pay. Among the things Dorsey agreed to do, as aforesaid, he was to pay the amount secured by this trust deed. The Pacific Petroleum Company entered into an agreement with the co-defendant, the Penn Development Company. Plaintiff complains that this agreement between the Pacific Petroleum Company and the Penn Development Company is nothing else than a mortgage, that is to say, the terms and conditions of the contract between these parties should in equity be construed as simply a mortgage upon the interests of the Pacific Petroleum Com-

pany. The plaintiff claims that, said agreement being a mortgage, plaintiff's rights in the premises are superior to it, that is to say, the plaintiff claims that the sale hereafter referred to, while it did pass the legal title, did not pass the equitable or fee title to the Penn Development Company, and that the Penn Development Company simply holds the legal title of the property as security for the payment of the money advanced by the Penn Development Company. The interest on the amount secured by the trust deed was not paid, and the trust deed was foreclosed and the property sold under its terms, and the purchase by the Penn Development Company was made after the execution of the agreement between the Penn Development Company and the Pacific Petroleum Company. Before consideration of the agreement between the Penn Development Company and the Pacific Petroleum Company and the argument that it is in effect a mortgage, it is appropriate to refer to the oral testimony in the case.

"Mr. Odell, the president of the plaintiff, testified that the defendant stated to him that the Penn Development Company would take care of and protect the rights of the plaintiff to the property involved in the suit. His testimony being in substance that Mr. Dorsey and Mr. Cochran were in his office when this matter was taken up, and he was led to believe that the Penn Development Company was going to pay this debt, but that they wanted the property sold at trustee's sale in order that the title that the trustee had would be in the Penn Development Company as security. This is not exactly the testimony of Mr. Odell,

but that is the theory upon which he desires his testimony to be regarded.

"Mr. Cochran flatly contradicted the statements of Mr. Odell in this regard, and testified that shortly before the sale Mr. Peters, another officer of the plaintiff and one who probably has more to do with and for the plaintiff than Mr. Odell, came to Dorsey's office and there inquired into the legality of the contract between the Penn Development Company and the Pacific Petroleum Company. There is no conflict as to the evidence that Mr. Peters did inquire into the legality and binding effect of the contract. The fact that Mr. Peters inquired into the validity of the execution of the contract between the Penn Development Company and the Pacific Petroleum Company is very material for the purpose of determining the conflicting testimony before referred to. Unless the plaintiff expected to secure benefit in some way through this contract, there would be no purpose at all in Mr. Peters examining into the execution of it.

"This contract corroborates the testimony of Mr. Odell that he was given to understand that the Penn Development Company was going to take care of the indebtedness, and convinces me that the testimony of Mr. Odell was correct.

"I have not investigated the question as to whether or not this testimony falls within the rule of the original promise upon a present consideration. It may be that the testimony is admissible upon that ground. I have not examined that question because no objection was made upon the ground that it was contrary to the statute of fraud at the time the testimony was given.

"But the evidence is relevant and material. Oral testimony is always admissible for the purpose of showing that a deed is a mortgage and this testimony is relevant and material for the purpose of showing that this whole transaction resulted simply in arranging a security for a debt and therefore it was an equitable mortgage.

"The agreement provides for the purchase by the Penn Development Company of the property in question at trustee's sale to be made to enforce the trust deed above referred to, and then provides as follows:

" 'The Penn Development Company is to take title to the same in fee simple absolutely without conditions or trust relations of any kind whatsoever, except the Penn Development Company shall forthwith enter into an option in the form attached hereto as Exhibit A.'

"There is another provision in the agreement, which is as follows:

" 'The Penn Development Company agrees to purchase at a sum not exceeding thirty thousand dollars at the forthcoming trustee's sale, the title in fee simple of the Ventura-California property, described as follows:' etc.

"Pursuant to this agreement the Penn Development Company did on March 11, 1914, buy this property at trustee's sale made under the trust deed first above mentioned, and took a deed absolute in form through its agent, the said Mr. Cochran, who transferred the property to Penn Development Company. It is well settled that if a deed is made to secure an indebtedness, regardless of the terms in which the instrument is

written, it may be shown that the language as above quoted is considered as inserted by the parties and as an interpretation of the agreement, or the rule that is so well established by decision and by the code that a deed may be shown to be a mortgage notwithstanding its terms, would be abolished.

"The agreement in this case took the form of two agreements, one a transfer of the interest of the Pacific Petroleum Company in the property, and an agreement on the part of the Penn Development Company to sell back the property. But they constitute one agreement. The agreement contains language from beginning to end showing that the Penn Development Company was simply advancing money to Pacific Petroleum Company in order to protect the Pacific Petroleum Company in the ownership of this property. It was agreed that when the Penn Development Company should be paid its money, the Pacific Petroleum Company would regain its property. The whole of the agreements must be read from beginning to end in order to comprehend the full force of plaintiff's claim. Besides their language, which tends to show it is a mortgage, it seems to me that the oral testimony introduced in this case shows that it is a mortgage. I think that the testimony of Mr. Odell is entirely admissible for the purpose of showing that this arrangement is a mortgage. The fact that the vice-president of the Pacific Petroleum Company inquired into the legality of this agreement before the sale, indicates that it was the understanding between the plaintiff and the Penn Development Company that the plaintiff was to be pro-

tected as to the indebtedness owed to it by the Pacific Petroleum Company.

"Defendant makes the point that the certificates, or so-called interim bonds, delivered are a cancellation of that part of the agreement to deliver $25,000 par value of the first mortgage bonds, but the interim certificates are simply receipts for bonds to be delivered. These instruments are simply memoranda of the progress toward the final adjustment of the matter.

"It appears from the evidence that the Pacific Petroleum Company has a judgment against Penn Development Company for a large sum of money, more than enough to pay the indebtedness. The Pacific Petroleum Company is not entitled to a lien on this property in advance to the plaintiff's lien. A court of equity certainly has power to subject this judgment lien of the Pacific Petroleum Company to the claim of the plaintiff's equitable mortgage. The plaintiff is entitled to a decree foreclosing its contract as an equitable mortgage, and to have the same declared a first lien upon this property, together with costs and the amount to which the plaintiff is entitled, $15,000 unpaid purchase money, $25,000 with interest thereon in lieu of the bonds the Pacific Petroleum Company failed to deliver."

The salient points to consider are:

1—The contract between plaintiffs and Dorsey, the obligations of which were assumed by Pacific Petroleum Company, whereby it was the duty of that company to pay the debt secured by deed of trust to Citizens Savings Bank.

2—The agreement between Pacific Petroleum Company and Penn Development Company by which the latter corporation undertook to advance money to protect Pacific Petroleum Company's property and in that connection to buy plaintiff's property for the benefit of Pacific Petroleum Company, whose duty it was to pay the debt represented by the Citizens Trust & Savings Bank, which agreement was a mortgage and subject to plaintiff's contractual rights.

3—It being the duty of Pacific Petroleum Company to pay the plaintiffs' debt, the defendant Penn Development Company in agreeing so to do and obtaining title through the trust deed sale as security in the nature of a mortgage, could have no greater rights than the Pacific Petroleum Company. Its equitable mortgage so acquired was therefore a second mortgage and subject to plaintiff's equitable lien on the premises for the payment of the balance of the purchase price due from Dorsey and Pacific Petroleum Company to it, of which Penn Development Company had not only constructive notice by recordation of the Ventura-California Oil Company-Dorsey contract and its assignment, but also actual notice as shown by the contract between Pacific Petroleum Company and Penn Development Company. [See Tr. p. 110, paragraph 1.]

ARGUMENT.

There are two causes of action set forth in the second amended complaint, the first of which is a complaint to quiet title, and the second to foreclose a

contract for the sale of real estate as an equitable mortgage lien.

The answer of the Penn Development Company claims title to the premises. The answer of the Pacific Petroleum Company is a denial of any amount due, but as the latter took no appeal its position need not be discussed.

1. On July 22, 1913, Ventura-California Oil Company and Stephen W. Dorsey entered into a written contract whereby the former agreed to sell and the latter agreed to buy the property on the following terms:

$ 10,000, receipt of which was acknowledged at the time of the agreement.

15,000, Nov. 1, 1913, cash.

110,000 by transfer and assignment of 11,000 shares of Pacific Petroleum Company stock of that par value.

25,000 in $25,000 par value of first mortgage bonds.

25,000 by assuming and paying an indebtedness of $25,000 running to the Citizens Trust & Savings Bank, trustee.

Taxes, etc.

Dorsey thus became the principal under his agreement to pay the $25,000 debt to the Citizens Trust & Savings Bank.

2. On July 24, 1913, Dorsey assigned this contract to the Pacific Petroleum Company "subject to all the conditions contained in said agreement upon the part of the party of the first part to be performed and which

the party of the second part herein agrees to perform," meaning that Pacific Petroleum Company thus agreed to assume and pay the Citizens Trust & Savings Bank mortgage, as well as the $15,000 and make the transfer of the stock and bonds.

Thus the Pacific Petroleum Company became the principal and Dorsey the surety to pay the Citizens Trust & Savings Bank debt, and the Ventura-California Oil Company also stood in the relation of surety to both.

3. Being thus obligated to pay, Pacific Petroleum Company did not pay the $15,000 nor the interest or debt on the Citizens Trust & Savings Bank mortgage nor the $25,000 in bonds. On February 17, 1914, Pacific Petroleum Company and Penn Development Company entered into a contract containing, among other recitals, the following [Tr. fols. 109 *et seq.*]:

"Whereas, the said Pacific Petroleum Company is under contract to purchase in fee simple certain oil properties in the state of California;

Whereas, certain of the *agreed purchase price has not been paid* on certain of the properties *under contract of purchase* as aforesaid, and

Whereas, *certain underlying mortgages assumed by Pacific Petroleum Company have not been paid,* and

Whereas, the Pacific Petroleum Company is desirous of entering into an agreement under which its property may be, to such extent as may be found possible, *preserved upon terms and conditions set forth in this agreement,* and

Whereas, the property known as the Ventura-California property is about to be sold in proceedings under a trust deed (meaning the plaintiff's property).

Now, therefore, it is agreed (etc.):

First: The Penn Development Company agrees to purchase, at a sum not exceeding $30,000, at the forthcoming trustee's sale, a title in fee simple to the Ventura-California property described as follows: (here describes property same as in complaint).

The Penn Development Company *is to take title to the same in fee simple absolutely without conditions or trust relations of any kind whatsoever, except* the Penn Development Company shall forthwith enter into *an option in the form attached hereto as Exhibit A.*

* * *

Fourth: The Pacific Petroleum Company *hereby transfers, sets over and assigns to the Penn Development Company* all its right, title and interest of every kind and description in and to *all the oil to be derived* from the operation of all the properties owned or leased by it or held by it under contract, to be held by the Penn Development Company in trust:

a. To pay expenses, etc.

b. To retain *the monthly sum of $2500* for a period of four months, and thereafter *$5000 per month* until all the money *advanced for the benefit of the Pacific Petroleum Company* shall have been paid to the Penn Development Company, or until such further period as shall be sufficient to pay to the Penn Development Company the amount to be paid under *the option hereto* attached *as Exhibit A, for the Ventura-California property.*

c. The balance to be used in other manners.

(There are other paragraphs relating to methods of payments.)

Seventh: Pacific Petroleum Company covenanted also that upon the *payment of a sum not exceeding $30,000* a title in fee simple may and shall be purchased by the Penn Development Company of and to the Ventura-California property on March 11, 1914."

Attached to this contract and as a part of it is Exhibit A, which substantially provides as follows:

In consideration of $1.00 it grants to Pacific Petroleum Company the *exclusive option to purchase the Ventura-California property within three years for the sum of $200,000 in cash, and certain stock.* Conditions are attached, among which are the following:

"3rd. There shall be subtracted from the purchase price under this option:

a. Twice such sum as shall comprise the difference between the amount advanced by the Penn Development Company and $100,000.

b. Such sum shall be received by the Penn Development Company under the operation of subdivision b of the contract (which is the provision relating to retaining $2000 to $5000 a month, as stated above)."

Paragraph V refers to the agreement of February 17, 1914, and provides that should the payments in subdivision B cease, the option should terminate and expire.

The Penn Development Company did buy the property at the trustee's sale through W. H. Cochrane, trustee, and received deed from him and now wrong-

fully claims to own the property by virtue of such conveyance.

This arrangement was a mortgage arrangement, the Penn Development Company becoming the creditor of Pacific Petroleum Company for the sum of $30,000 so far as this property is concerned, which was to be repaid with a large premium amounting, when the matter is estimated, under the terms of the option, to about $28,000 in cash over and above the $30,000, and in addition considerable holdings in stock. It took the title by purchase to the premises as security for the performance of this obligation.

4. Conditions being such, Penn Development Company failed to put in certain moneys or to proceed in conformity with the contract, and Pacific Petroleum Company sued Penn Development Company and obtained a judgment for $325,000 damages, which judgment is in full force and vigor.

The fact that this judgment stands is evidence as between Pacific Petroleum Company and Penn Development Company of the adjustment of the covenants between them. Pacific Petroleum Company does not have to pay Penn Development Company anything and is entitled to a reconveyance of the property.

So far as plaintiff is concerned, it had a right to foreclose its contract and to have an order *nisi* adjudging that either Pacific Petroleum Company or Penn Development Company shall pay the balance due on this contract or be forever foreclosed of any rights therein.

Certain points of law need only be called to the attention of the court.

I.

The United States Courts Administer Realty Rights According to State Law and Practice.

In a controversy respecting the title to lands in a state, United States courts will administer the law of the state in all respects as if it were a court sitting there and reviewing the decree of an inferior court in that locality.

Slaughter v. Glenn, 98 U. S. 242 (L. E. Vol. 25-122);
Hewitt v. Story, 39 Fed. 721.

And the fact that the District Court decided some of the facts on conflict of testimony should cause the court here to observe the rule followed by the California Supreme Court to the effect that as to such facts the findings of the trial court will not be disturbed.

II.

Legal and Equitable Rights May Be Declared Upon in the Same Action, and in Action to Quiet Title Legal and Equitable Rights May Be Adjusted.

Actions at law and in equity may be joined if they arise out of the same matter. The form of actions is abolished both by the United States equity rules and by the Code of California.

Hughes v. Dunlap, 91 Cal. 389;
Watson v. Sutro, 86 Cal. 527;
Wolverton v. Baker, 86 Cal. 593;
Louvall v. Gridley, 70 Cal. 507.

Amendments are allowed to conform to the testimony.

Walsh v. McKeen, 75 Cal. 520.

In a quiet title suit legal and equitable rights may be adjusted.

Murphy v. Crosby, 140 Cal. 141;
Hughes v. Dunlap, 91 Cal. 385.

A complaint seeking to quiet plaintiff's title and also to annul a sheriff's deed to defendant under foreclosure of mortgage made subsequently to the record of a conveyance by mortgage under which plaintiff claims title, states only a single cause of action and there is no misjoinder.

Beronio v. Ventura C. L. Co., 129 Cal. 232;
Cady v. Purser, 131 Cal. 561.

In such case where defendant denies he holds a debt as security, no demand or offer to pay is necessary before bringing suit.

DeLeonis v. Walsh, 140 Cal. 175;
Coates v. Cleaves, 92 Cal. 427.

III.

A Proper Action in a Case of This Kind Is One to Foreclose the Contract of Purchase as an Equitable Mortgage, the Decree Giving the Defendant a Certain Period of Time to Pay or Be Foreclosed of the Right of Redemption. Here the Decree Was More Liberal, and Provided for a Term of Redemption.

In a case where one Keller agreed to sell real property on deferred payments to one Lewis, and entered into a written contract to convey the property after the payments should be made, it was held that the legal title was retained by the vendor as security for the balance of the purchase money, and that if the payments were not made when due, he might, if out of possession, bring an ejectment and recover the possession, or go into equity for relief as a better remedy in case of persistent default on the part of the vendee and institute proceedings to foreclose the rights of the vendee to purchase, the decree giving the latter a definite time within which to perform.

Keller v. Lewis. 53 Cal. 118.

This case has been cited and approved and followed in the following:

Fairchild v. Mullan, 90 Cal. 194;
Southern Pacific Co. v. Allen, 112 Cal. 462;
Glock v. Howard, 123 Cal. 11;
Greenwood v. Beeler, 152 Cal. 415;
Vance Redwood L. Co. v. Durphy, 8 Cal. App. 671.

It Is Well Established California Law.

A case in point is Odd Fellows Savings Bank v. Brander, 124 Cal. 257, which was an action to foreclose the rights of the vendee under a contract for the purchase and sale of land. Brander, the vendee, had assigned his interest in the contract to other defendants who were made parties to the action. The court in that action said:

> "1. Appellants claim that, as the contract had passed to the defendants other than Brander, the sixty-day limitation in which to make payment ought to have run to them and not to Brander. The promise to pay was by Brander alone. The other defendants assumed no liability to plaintiff and none was enforceable against them by plaintiff. They were made parties. and as assignees of Brander could have fully protected themselves by asking that they be permitted, as Brander's assignees, to bring the money into court and make payment within the time fixed by the court. They made no such request, and no cause appears, either from the answer or the stipulated facts, entitling them to be treated as principal debtors or vendees. Brander's obligations to plaintiff remained undischarged after his assignment to the other defendants. (Cvi. Code, sec. 1457.) These latter defendants have no cause for complaint that the sixty-day privilege to pay for the property and take a deed did not in terms include them. (Truebody v. Jacobson, 2 Cal. 269.)
>
> 2. Appellants contend that the decree should have ordered the property sold in the event of failure to redeem within sixty days, as in the case of a mortgage. Appellants misconceive the pur-

pose of the remedy. The course pursued in this case was in harmony with the well-settled practice in this state in like cases. (Sparks v. Hess, 15 Cal. 186; Keller v. Lewis, 53 Cal. 113; 56 Cal. 466; Fairchild v. Mullan, 90 Cal. 190; Southern Pac. R. R. Co. v. Allen, 112 Cal. 455; Rayfield v. Van Meter, 120 Cal. 416.)

"3. It is objected that the decree gives plaintiff the land and allows it to retain the money paid on account of the price. This was not error. It is well settled that 'a party who has advanced money, or done an act, in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done.' (Hansbrough v. Peck, 5 Wall. 497; Ketchum v. Everston, 13 Johns 359, 7 Am. Dec. 384; Keller v. Lewis, *supra.*) This is true whether or not the contract provides for a forfeiture of payments made in case of the vendee's failure to complete the purchase. (Glock v. Howard etc. Co., 123 Cal. 1.) The present case is a striking illustration of the wisdom and justice lying at the root of this rule. Brander and his assigns have been in possession of this land since the purchase, presumably receiving its rents and profits, and have not only failed to make the payments due on the principal debt, but have defaulted in payment of rent and taxes to an amount greater than the payments made on the price. The contention of defendants has no merit. The law will not permit defendants to profit pecuniarily by their own default."

See, also,

Cross v. Mayo, 167 Cal., at page 606;
Birch v. Cooper, 136 Cal. 638;
Woodard v. Hennegan, 128 Cal. 293;
Whittier v. Stege, 61 Cal. 241.

In the case entitled Moultrie v. Wright, 154 Cal. 520, the facts were as follows: Fitch conveyed by deed to Tapia certain land. The consideration was $600.00 in cash and three lots conveyed by Tapia to Fitch, and also a deed from Amaya conveying another parcel of land to him. Tapia and Amaya agreed between themselves that each should own an undivided half of the land bought of Fitch, and that Tapia should hold title to the one-half in trust for her. Doane loaned Tapia $1000.00 and Doane was informed that Tapia held one-half in trust for Amaya. Doane foreclosed his mortgage. Prior to the foreclosure Tapia and Amaya mortgaged the land to Hoffman, who assigned the mortgage to Wright. Tapia and his wife then conveyed the land to Hoffman in satisfaction of the Hoffman mortgage. Hoffman claimed that he owned half of the property *formerly* belonging to Amaya free of Doane's mortgage. The court held that payment of one-half the purchase price of the Fitch land by Amaya constituted her an owner, and that Tapia, who took the title, as a resulting trust in favor of her of one-half. We quote from the opinion as follows:

> "And if Doane took his mortgage from Tapia with knowledge of the trust, his mortgage lien was subject thereto, then any title to such one-half interest that might be obtained by him, or by his

estate, or by his administratrix in her representative capacity, under a foreclosure of such mortgage, would be held as successor of Tapia in trust for Carlotta Tapia or Hoffman, her grantee, free from the mortgage lien. (Prince v. Reeves, 38 Cal. 457; Riley v. Martinelli, 97 Cal. 580 (33 Am. St. Rep. 209, 32 Pac. 579); Murphy v. Clayton, 113 Cal. 157, 45 Pac. 267.) * * *

"Furthermore, the evidence of the agreement of Tapia, that he would hold title to one-half the land in trust for Amaya, was important and material on the question of laches. If he took the title in his own name without her knowledge or consent, the law would raise a constructive trust; if by agreement with her, then only a resulting trust would be created. (Fulton v. Jansen, 99 Cal. 591, 34 Pac. 331.)"

Applying the principles in these cases to the case at bar, it is clear that upon failure of Dorsey or of Pacific Petroleum Company to perform the conditions of the contract with plaintiff, the latter might foreclose its lien on the property as an equitable mortgage.

If appellant desired to protect its title or mortgage lien it could pay appellee the balance of the purchase price.

IV.

The Defendants Are Estopped to Deny Plaintiff's Title.

In the contract between Pacific Petroleum Company and Penn Development Company the contract of the plaintiff and Dorsey, assigned to and assumed by the Pacific Petroleum Company, is expressly recognized.

No agreement of these two defendants could impair the rights of the plaintiff under its contract with Dorsey and Pacific Petroleum Company.

Coates v. Cleaves, 92 Cal. 430;
Hicks v. Lovell, 64 Cal. 20;
Tyler on Ejectment, 558.

V.

Retention of Title by a Vendor Is in the Nature of an Imperfect or Equitable Mortgage to Secure the Balance of the Purchase Price.

Where an executory contract for the sale of land is made by parties, it is held that the retention of the legal title by the vendor as security for the payment of the balance of the purchase money, giving only an equitable estate in the land to the vendee, establishes the relation of an imperfect or equitable mortgage, and the land is by such express contract held in pledge for such payment.

Longmaid v. Coulter, 123 Cal. 208.

VI.

Pacific Petroleum Company, by Assuming to Pay the Plaintiff's Debt to Citizens Savings Bank, Became the Principal Debtor.

It is well settled that the grantee of the mortgaged premises who not only takes the land subject to the mortgage, but assumes its payment, is liable to the mortgagee for any deficiency which may remain after exhausting his security under the mortgage; though as to the ground upon which

this liability is placed the authorities are by no means uniform. That he is so liable, see Biddel v. Brizzolara, 64 Cal. 354; Pellier v. Gillespie, 67 Cal. 583; Thomson v. Bettens, 94 Cal. 82; Williams v. Naftzger, 103 Cal. 438; Keller v. Ashford, 133 U. S. 622. * * *

"The best considered cases place the liability of the subsequent grantee of the mortgaged premises who has assumed the payment of the debt upon the ground that, as between him and his grantor, he becomes primarily liable for the payment of the debt secured by the mortgage, and his grantor becomes his surety; that, though as between the grantor, Madden, and the plaintiff, the mortgagee, Madden is the principal debtor, yet in equity the creditor is entitled to the benefit of all securities or collateral obligations that his debtor may have acquired for the payment of the debt, and the creditor may, in his action to foreclose the mortgage, treat the mortgagor's grantee, who has assumed the payment of the debt, as a principal debtor, and hold him liable for any deficiency for which the mortgagor would be liable on his express promise. (Williams v. Naftzger, *supra,* and cases there cited.)"

Tulare County Bank v. Madden, 109 Cal. 314;
Hopkins v. Warner, 109 Cal. 133;
Krelling v. Krelling, 118 Cal. 419;
1 Jones on Mortgages, section 741.

Furthermore, the grantor of the land is authorized to bring an action to enforce the payment of the mortgage without first making the payment himself.

Krelling v. Krelling, 118 Cal. 419;
Abell v. Coons, 7 Cal 105;
1 Jones on Mortgages, section 769.

VII.

Pacific Petroleum Company Being the Principal and Obligated to Pay the Mortgage Running to the Citizens Trust & Savings Bank Given by Ventura California Oil Company, Entered Into a Written Agreement Whereby Defendant Penn Development Company Advanced Money to Purchase at the Trustee's Sale a Legal Title Which the Pacific Petroleum Company Would Have Acquired Had It Paid the Debt Itself and Kept the Other Covenants of Its Agreement, and by Agreeing to Convey the Title to the Pacific Petroleum Company for the Considerations Expressed in the So-Called Option, the Relation of Mortgagor and Mortgagee as Between Said Defendants Was Established. The Penn Development Company Having Taken Title Subject to the Contract of the Ventura-California Oil Company With Dorsey and Pacific Petroleum Company, Is Subject to Its Provisions, Because It Did No More Than Was Required of the Pacific Petroleum Company When It Paid a Debt to Citizens Savings Bank Which That Company Had Agreed to Pay.

In Sandfoss v. Jones, 35 Cal. 481, it appears that in August, 1865, one Bartram was the owner of a tract of land, but was in debt, and one Jones had a mortgage on a parcel of real estate. All of his creditors brought suit, Jones bringing a suit to foreclose and the others bringing attachments. Bartram applied to Jones and Blanchard for assistance and it was finally

agreed that Jones and Blanchard should receive possession of all of Bartram's property, *that they would bid in certain properties at sheriff's sale on executions and hold the title as security for such advances as they might make and the debts which would then be due them, and that whenever sales of personal property to be made by them and the profits of business should reimburse them for advances made, if they acquired the titles at sheriff's sale, they would restore him to possession of his real estate and all the personal property remaining unsold.* They carried out this agreement by bidding in real estate and receiving a sheriff's deed in their own names. In time all the claims against Bartram were extinguished, including their own, with money derived from the property and business. Bartram demanded an account and a reconveyance of his property. Then Bartram conveyed all his interest to plaintiff Sandfoss, while defendant Blanchard conveyed his interest to Flansburg, who took with notice of Bartram's equity. Plaintiff Sandfoss brought an action for an accounting and a reconveyance of the properties and won.

In the case at bar. Ventura-California Oil Company. being indebted, obtained the written agreement of Dorsey and of the Pacific Petroleum Company to pay the debt, and Pacific Petroleum Company, being either unwilling or unable to do so, agreed with Penn Development Company that if Penn Development Company would bid in the property of plaintiff Ventura-California Oil Company, then out of the profits derived from sales of oil produced on the land the

amounts advanced by Penn Development Company should be repaid, and also that Pacific Petroleum Company should have an option to repurchase, as an alternative proposition.

The cases are on all fours. The court said in that case:

> "If, however, we consider the averments of the complaint in the light which is most favorable to the defendants, we have a verbal agreement on their part with an execution debtor, whose land is about to be sold by the sheriff, to purchase it with their own funds, and hold it for his benefit. *Such an agreement is equivalent to a loan of the money and a taking of the title as security for its repayment;* or an agreement by one person to purchase land for the benefit of another, under circumstances which would amount to a fraud upon the latter, if the former was allowed to repudiate his promise, and, therefore, not within the statute of frauds.
>
> "In relation to such a contract the High Court of Errors and Appeals of the state of Mississippi said: 'It is not now an open question that when a party agrees before the sale to purchase property about to be sold under an execution against a party, and to give such party the benefit of the purchase, that the agreement is binding and will be enforced. The defendant, upon the faith of such an agreement, may have ceased his efforts to raise the money for the purpose of paying off the execution, and thus preventing a sale of his property. It will not do to say that the party promising was moved merely by friendly or benevolent considerations, and may, therefore, at his option, decline a compliance with his agreement. Such con-

siderations constitute the foundation of almost every trust, and the trustee should be held to account as nearly as possible in the same spirit in which he originally contracted. But it is said that the agreement, if in fact made, was void under the statute of frauds. The statute has reference alone to the sale of lands, and not to a contract to purchase by one person for the benefit of another.' (Soggins v. Heard, 31 Miss. 428.)"

The court held that plaintiff should recover and be allowed to redeem the land and have a reconveyance.

Where the lender of money took as collateral security a note and mortgage for a much larger sum on a third person with an express understanding that he should foreclose the mortgage, buy in the premises at the sale, and hold them in place of note and mortgage as security for his loan, it was decided that he held a resulting trust in the nature of a mortgage, citing Sandfoss v. Jones as authority. The creditor who foreclosed the mortgage and purchased it, then sold it to a man named Wilson, who took with notice of the situation, and as to him it was held the property was charged with the trust.

Price v. Reeves, 38 Cal. 460.

Sandfoss v. Jones, *supra,* is cited also in another case, holding that where the owner of land about to be sold for taxes requests another to buy it in and furnishes him money therefor and the latter buys it in at the tax sale in his own name, he becomes a resulting trustee for the former owner, although he made no express promise to purchase it for the latter.

O'Connor v. Irvine, 74 Cal. 439.

That one who purchases property at a sale under execution or trust deed with an agreement that the owner or his assignee may redeem obtains only a mortgage interest, as stated in Sandfoss v. Jones, *supra,* is held in the following cases from other states to be the general rule:

Gaines v. Brockerhoff, 136 Pa. 175;
Hoile v. Bailey, 58 Wis. 434;
Phelan v. Fitzpatrick, 84 Wis. 247;
Wilson v. McWilliams, 16 S. D. 96;
Blair v. McMillan (Tenn.), 59 S. W. 788;
Papineau v. Grant, 2 Grant Ch. (U. C.) 512;
Mahaffy v. Faris, 144 Iowa 220;
Snavely v. Preckle, 29 Gratt. (Va.) 27;
Combs v. Little, 4 N. J. Eq. 310;
Klocks v. Walter, 70 Ill. 416;
Morris v. Budlong, 78 N. Y. 543;
American Mtge. Co. v. Williams, 145 S. W. 239.

"F and J, desiring to purchase some land, requested E to advance the money and as security for its repayment, to take title to the land. In such cases a trust is presumed to result in favor of the persons paying the consideration, and the grantee will be declared a trustee for them as to the land. (C. C. Sec. 853.) The loan of money by E to the purchasers was in legal effect a transfer of the money to them. The consequence was that when the money was paid in the settlement of the purchase price it was their money and not E's that was so paid. The fact that it was paid directly to the vendors by her (E's) agent does not alter the legal effect of the transaction. The transfer being

made to E, she became a trustee holding title to the land for the other interested parties. No writing was necessary to create a trust of this character. It is a trust which the law implies from the facts of the case, and may be created without writing."

Brown v. Spencer, 163 Cal. 593.

But in the case at bar we have a written agreement.

In the case of Couts v. Winston, 153 Cal. 686, one Couts owed a bank a debt secured by mortgage on a parcel of real estate. Being unable to pay it he requested Winston to advance him enough to pay it and a small sum in addition, and to take a deed of the property. He gave a deed subject to the mortgage, received from Winston a lease for one year on the property, and in the lease *an option to purchase the property* at the amount advanced by Winston to pay the mortgage and the money in addition above mentioned. No promise to repay was made at any time by Couts, but Couts agreed verbally to further quitclaim at the end of the option term. This agreement was held an equitable mortgage.

In Meeker v. Shuster, 5 Cal. Unrep. Cas. 582, it appears that one Shuster owed Barnes money on a contract of purchase wherein Barnes agreed to sell and Shuster agreed to buy a parcel of land. Shuster applied to Meeker for a loan to pay the balance due on the contract, and requested him to take a mortgage. Meeker refused to take a mortgage, but agreed to pay the amount due to Barnes, take a deed direct from him for the property, and give Shuster a bond for a deed

by which he obligated himself to convey the land to Shuster in ten years upon payment of the amount which he advanced to Barnes, with interest. An action was brought by Meeker to have the deed received by him declared a mortgage and to foreclose the same.

The court said:

> "Section 2924 of the Civil Code provides: 'Every transfer of an interest in property other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in case of personal property it is accompanied by actual change of possession, in which case it is deemed a pledge.' See, also, Montgomery v. Spect, 55 Cal. 352. If the transfer created a trust, as contended by appellant, it would not aid him, since in that case the terms of the trust were evidenced by the bond, and the trustee of the title could not claim the possession until the bond should be forfeited or canceled by the defendants. It was not a trust, however, in the sense of the statute, but a mortgage."

In Meeker v. Shuster, 4 Cal. App. 296, the action was to foreclose the mortgage mentioned in the above case, and the court approves the judgment in that case.

In Windt v. Covert, 152 Cal. 352, Covert purchased land from Brown with money she borrowed of Windt, and directed Brown to execute a conveyance to Windt as security. There was a mortgage to one Hardy on the premises already, and Hardy brought an action to foreclose and the plaintiff paid Hardy. An action was brought by Windt to foreclose his deed as a mortgage. The court said:

"That the conveyance of the property in question to the plaintiff, under the circumstances above set forth, constituted him the holder of a special lien within the meaning of the Civil Code (see sec. 2875) is not questioned. The plaintiff became the holder of the legal title, subject to a resulting trust in favor of the defendant, the real purchaser. But the fact that the title was conveyed as security gave the transaction, in equity, the additional character of a mortgage. (Civ. Code, sec. 2928.) 'In such a case the grantee holds a double relation to the real purchaser, he is his trustee of the legal title to the land and his mortgagee for the money advanced for its purchase.' (Campbell v. Freeman, 99 Cal. 546, 548 (34 Pac. 113); Woodard v. Hennegan, 128 Cal. 293 (60 Pac. 769); Banta v. Wise, 135 Cal. 277, 67 Pac. 129.)"

See, also,

Todd v. Todd, 164 Cal. 258.

The foregoing case cites Campbell v. Freeman, 99 Cal. 548, wherein it appeared that a similar transaction was had, and in holding that a conveyance is none the less a loan because it was made to the grantee directly by third party to secure a loan to a purchaser for the amount of purchase money, the court said:

"Equity looks beyond the form of a transaction and shapes its judgments in such a way as to carry out the purposes of the parties to the agreement and to protect each of them against any unconscionable advantage to be derived from the apparent form in which the transaction has taken place."

Perry on Trusts, section 133, states a rule as follows:

"If one should advance the purchase money and take the title to himself, but should do this wholly upon the account and credit of the other, he would hold the estate on a resulting trust for the other."

Cited in

Hellman v. Messmer, 75 Cal. 170;
Thomas v. Jameson, 77 Cal. 93.

Where a person bought property, but the contract to purchase was taken in the name of another who advanced the money at his request and who agreed to take the title to the contract of sale in his name as security for the payment of advances made by him, it was held that the resulting trust in the nature of a mortgage was thereby constituted.

Walton v. Karnes, 67 Cal. 256.

Cited in

Ward v. Matthews, 73 Cal. 16;
Savings Society v. Davidson, 97 Fed. 712.

Appellant's Points.

A careful examination of appellant's points and argument does not even raise a doubt in our minds of the soundness of our theory of the case, as comprehended and approved by the able trial judge who had many years of active practice in California law before going on the bench and whose ability is only matched by his extensive learning.

Some of the points made are frivolous.

For instance, in speaking of the duties of Secretary Peters as manager, it was testified at length by Mr. Odell as to Peters' general duties, and, not in connection with any discussion of the amounts due on the contract, but only as describing his general duties, Mr. Odell said: "He was our secretary and treasurer and

received the money and paid it out on order of the board of directors." On page 16 of the appellant's brief counsel capitalize the words *"received the money"* as if it referred to the $15,000 under discussion on that page. Counsel can not be serious, surely!

It must be camouflage, for the answer of the Penn Development Company admits [Tr. p. 28] that said sum was not paid, and also admits that the $25,000 in bonds were not turned over. The answer of Pacific Petroleum Company is not evidence, and it is not the answer of appellant.

The above remarks are pertinent to appellant's argument concerning the bonds on pages 13 to 18, inclusive, where, although appellant's answer admits that the bonds were not delivered, yet counsel gravely and extensively argue to the contrary by asserting that the so-called "Interim Bonds," or receipts stating that bonds would be delivered, were payment of the $25,000 of the purchase price, due to appellees under the contract of sale between the Ventura-California Oil Company and Dorsey, which was assigned to Pacific Petroleum Company.

The answer of the Pacific Petroleum Company [Tr. p. 32] admits that the $25,000 par value of bonds had not been delivered, but does allege that "temporary receipts for such bonds were executed and delivered to plaintiff, etc."

Debts cannot be paid by receipts or statements promising to deliver payments some time later.

All other points made by appellant are refuted by the abundant authority cited above in our main argument.

Counsel devote considerable space to a discussion of estoppel, and claim it should have been pleaded by plaintiff. In an action to quiet title in California or to foreclose a mortgage or a lien in the nature of a mortgage, plaintiff need only set forth claim of title or the instruments sued on and allege aptly defaults or that defendants claim some interest which is subject to plaintiff's title. He does not have to set up defendants' claim of title and then proceed to knock it down. Defendant must plead a special defense if he have any, either facts to estop plaintiff or in bar or by way of avoidance. If he plead a special defense, it is not necessary in California to file a replication setting up an estoppel or an avoidance of the allegations in the answer. All such matters in the answer, whether pleaded affirmatively or not, are deemed denied or answered, and all facts that may create an estoppel are deemed well pleaded.

As this case was begun in a Superior Court of California, and transferred to the District Court of the United States, the rules of California practice have been followed. And even if the cause had been begun in the District Court, the pleadings and practice of the California courts would have been followed.

No cases need be cited on these rules. Code provisions cover them.

We respectfully submit that the judgment should be affirmed.

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